CHAN KWAI CHUN

v.

LEMBAGA KELAYAKAN

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
MOHD SAARI YUSOFF JCA
MOHD NOOR AHMAD JCA
[CIVIL APPEAL NO: W-01-06-2002]
30 MAY 2002

LEGAL PROFESSION: *Admission - Examination - Certificate of Legal Practice - Results of July and October 2001 examination - Decision of Qualifying Board to nullify results after investigations revealed that results had been compromised - Jurisdiction of court to review decision - Whether within s. 26(1) Legal Profession Act 1976 - Whether Board estopped from nullifying results after it had earlier announced them - Whether candidates given a right of hearing before decision to nullify was taken - Whether decision rightfully made in the interest of public and legal profession*

LEGAL PROFESSION: *Qualifying Board - Examination - Certificate of Legal Practice - Results of July and October 2001 examination - Decision of Board to nullify results after investigations revealed that results had been compromised - Jurisdiction of court to review decision - Whether within s. 26(1) Legal Profession Act 1976 - Whether Board estopped from nullifying results after it had earlier announced them - Whether candidates given a right of hearing before decision to nullify was taken - Whether decision rightfully made in the interest of public and legal profession*

EVIDENCE: *Documentary evidence - Admissibility - Maker not called - Whether hearsay - Whether s. 2 of Evidence Act 1950 applicable*

The respondent was the Qualifying Board established under s. 4 of the Legal Profession Act 1976 ('LPA') with the function of providing courses of instruction and conducting examinations. The respondent nullified the results of the Certificate of Legal Practice examination held in July 2001 and in October 2001 after investigations revealed that the results had been compromised. The investigations were based upon a complaint of a leakage of the question papers. With the nullification of the results, the appellant who had earlier passed the July examination when the results were first announced on 13 September 2001, was found to have failed the examination. That led to the appellant's application to the High Court for declaratory reliefs, *inter alia*, that the plaintiff's nullification of the results of the examination was flawed. However, that application was dismissed by the trial judge. Hence, the appellant's appeal before this court.

The issues, *inter alia*, were: (1) whether the reliefs prayed for fell within s. 26 of the Legal Profession Act 1976 ('LPA'); (2) whether two documents, *ie*, the master list report and the answer scripts tendered on behalf of the respondent were admissible; (3) whether the respondent's decision to nullify the examination was amenable to judicial review; (4) whether the doctrine of estoppel applied; and (5) whether the appellant was given a right of hearing.

Held:
Per Mohd Saari Yusoff JCA

[1] This court agreed with the trial judge that in construing s. 26(1) LPA, it should be read together with s. 26(7) of the same and that on the preliminary issue, the application could not appropriately be made under s. 26 thereof. The operative words of s. 26(7) are "any order under this Act". On this issue, this court's finding was in the negative and on this ground alone, the appellant's case must fail. (p 238 e)

[2] The court's function is only to review the decision of the respondent pursuant to s. 26 LPA and not to act as an appellate body and rehear the case. The court as a judicial authority must look at all the facts and evidence that were before the respondent. Therefore, the respondent was not obligated to adduce first hand evidence but merely to show that it had considered all relevant facts and disregarded irrelevant facts. Further, whether the two documents which the respondent acted upon were admissible or not was a non-issue. Looking from another perspective, bearing in mind that the present case proceeded on the basis of affidavit evidence, the hearsay rule did not apply by virtue of s. 2 of the Evidence Act 1950. Moreover, the facts as contained in the impugned documents were not contradicted by other evidence. (pp 238 g-h & 239 e-f)

[3] If the respondent were to uphold the decision based on the examination results pronounced on 13 September 2001, such an act would be *ultra vires* the LPA being contrary to s. 5(e) of the same Act. (p 239 h)

[4] As the decision based on the examination results pronounced on 13 September 2001 was void, the doctrine of estoppel was not applicable. (pp 239 i & 240 a-b)

[5] Generally, the procedure at the inquiry should not be conducted in the same manner as in criminal trial in a court of law. What is required is that the procedure must be fair. What is fair will depend on the facts and circumstances of each case. (p 240 c)

[6] Many students besides the appellant were informed that they had passed the examination and accordingly started their pupilage. Therefore, the respondent had a duty to act with great promptitude. The respondent held many meetings to ensure that the integrity of the profession was maintained. The number of pupils were nearly 300 which made it impracticable to conduct individual hearings. (p 240 e)

[7] In any event, the appellant was given a right of appeal to which she did appeal and the respondent had considered her appeal. Although the respondent did not hear the candidates individually the fact that the respondent went through every paper and convened numerous meetings showed that it gave careful consideration and did not act in a cavalier manner. The respondent also consisted of responsible persons including the attorney general and senior judges. The respondent also heard the views of the Bar Council. (p 240 f)

[8] The appellant was in effect asking the court to pass a candidate who had failed the examination. Declaration is a discretionary remedy. It is not in the interest of the profession or the public for the court to exercise the discretionary power in her favour. The trial judge was right in dismissing the application. (p 241 e)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden adalah sebuah Badan Kelayakan Undang-Undang yang ditubuhkan di bawah s. 4 Akta Profesion Undang-Undang 1976 ('LPA') bertujuan untuk memberikan latihan dan mengelolakan peperiksaan. Responden telah membatalkan keputusan peperiksaan Sijil Amalan Guaman bulan Julai 2001 dan Oktober 2001 selepas siasatan menunjukkan bahawa keputusan peperiksaan itu mencurigakan. Penyiasatan dibuat berdasarkan aduan kebocoran soalan berkaitan dengan peperiksaan tersebut. Dengan pembatalan keputusan peperiksaan itu, perayu yang sebelum ini lulus peperiksaan bulan Julai pada kali pertama diumumkan pada 13 September 2001, kemudiannya didapati gagal dalam peperiksaan tersebut. In menyebabkan perayu memfailkan permohonan ke Mahkamah Tinggi untuk relif pengisytiharan antara lain pembatalan keputusan peperiksaan itu adalah tidak sah. Bagaimanapun, permohonan itu telah ditolak oleh hakim perbicaraan, maka perayu telah merayu ke mahkamah ini.

Isu-isunya antara lain adalah: (1) adakah relif yang dituntut termasuk di dalam s. 26 LPA; (2) adakah kedua-dua dokumen iaitu laporan senarai induk dan skrip jawapan yang dikemukakan bagi pihak responden boleh diterima; (3) adakah keputusan responden untuk membatalkan peperiksaan itu dapat dipinda dalam kajian semula; (4) adakah doktrin estopel terpakai; (5) adakah perayu diberi hak perbicaraan.

Diputuskan:
Oleh Mohd Saari Yusoff HMR

[1] Mahkamah ini bersetuju dengan keputusan Hakim Mahkamah Tinggi yang memutuskan bahawa dalam mentafsirkan seksyen 26(1) LPA, ia sepatutnya dibaca bersama s. 26(7) dan menyimpulkan bahawa bagi isu permulaan/awal, permohonan itu tidak sesuai dibuat di bawah s. 26. Inti s. 26(7) adalah perkataan "any order under this Act". Dalam isu ini, penemuan mahkamah ini adalah negatif dan atas alasan ini sahaja, kes perayu harus gagal.

[2] Fungsi mahkamah adalah hanya untuk mengkaji semula keputusan responden menurut s. 26 LPA dan bukan sebagai satu badan rayuan untuk mendengar semula kes. Mahkamah ini sebagai autoriti kehakiman mestilah melihat kesemua fakta kes dan bukti-bukti yang ada dihadapan responden. Dengan demikian, responden tidak mempunyai tanggungjawab untuk mengemukakan bukti-bukti nyata tetapi memadai dengan menunjukkan bahawa responden telah menimbangkan kesemua fakta yang relevan dan mengenepikan fakta-fakta yang tidak relevan. Selanjutnya, adakah kedua-dua dokumen di mana responden telah mengambil tindakan boleh diterima atau tidak bukanlah satu isu. Melihat kepada perspektif lain, perlu diingatkan bahawa kes ini dijalankan atas dasar keterangan affidavit, peraturan dengar cakap tidak terpakai dengan sebab s. 2 Akta Keterangan 1950. Tambahan pula, fakta yang terkandung dalam dokumen yang dicurigai itu tidak disangkal dengan bukti-bukti lain.

[3] Sekiranya responden menegakkan keputusan peperiksaan yang diumumkan pada 13 September 2001, perbuatan ini akan menjadi *ultra vires* LPA kerana bercanggah dengan s. 5(e) Akta yang sama.

[4] Memandangkan keputusan berdasarkan keputusan peperiksaan yang diumumkan pada 13 September 2001 itu tidak sah, doktrin estopel tidak terpakai.

[5] Lazimnya, prosedur dalam satu siasatan tidak sepatutnya dikelolakan sebagaimana dalam perbicaraan jenayah di mahkamah. Apa yang diperlukan adalah prosedur itu mestilah adil dan ini bergantung kepada fakta dan perihal setiap kes.

[6] Ramai penuntut selain dari perayu telah diberitahu bahawa mereka telah lulus dalam peperiksaan tersebut dan kemudiannya telah memulakan latihan dalam kamar. Dengan itu, responden bertanggungjawab untuk bertindak dengan pantas. Responden telah mengadakan banyak perjumpaan bagi memastikan integriti profesion dikekalkan. Jumlah penuntut yang hampir 300 orang menyebabkan ianya tidak praktikal untuk mengadakan perjumpaan secara individu.

[7] Walaubagaimanapun, perayu telah diberi kebenaran untuk merayu dan telah memfailkan rayuan dan responden telah menimbangkan rayuannya. Walaupun responden tidak berjumpa calon secara individu, responden telah mengkaji semula semua kertas peperiksaan dan mengadakan banyak perjumpaan menunjukkan bahawa responden telah memberikan pertimbangan yang sewajarnya dan tidak bertindak dengan sikap tidak bertimbangrasa. Responden juga terdiri daripada mereka yang bertanggungjawab termasuklah Peguam Negara dan hakim-hakim kanan. Responden juga mendengar pendapat Majlis Peguam.

[8] Perayu sebaliknya meminta mahkamah untuk meluluskan calon yang telah gagal dalam peperiksaan itu. Pengisytiharan adalah satu remedi yang tertakluk kepada budibicara mahkamah dan kes ini bukanlah untuk kepentingan profesion atau awam bagi mahkamah berpihak kepada responden. Tindakan hakim Mahkamah Tinggi menolak permohonan itu adalah tepat.

[Rayuan ditolak.]

Case(s) referred to:
Bohjaraj Kasinathan v. Nagarajan Verappan & Anor [2001] 4 CLJ 433 ***(dist)***
Loganathan PL Suppiah v. Lembaga Kelayakan Profession Undang-Undang Malaysia [1997] 3 CLJ 914 ***(refd)***
Russel v. Duke of Norfolk [1949] All ER 109 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 2
Legal Profession Act 1976, ss. 4, 5(e), 21(1), (4), 22, 23, 26(1), (7)

Other source(s) referred to:
Michael Akehurst, *Public Law*, 1982, p. 619
MP Jain, *Administrative Law of Malaysia and Singapore*, 1980, p. 377

For the appellant - Karpal Singh (Jagdeep Singh Deo & Ramkarpal Singh); M/s Karpal Singh & Co
For the respondent - Zaki Tun Azmi (Alvin John); M/s Rashid & Lee
Watching brief for Kuala Lumpur Bar Committee - Cheng Poh Heng (Yugan Pathmanaban)

[Appeal from High Court, Kuala Lumpur; Originating Summons No: R2-17-95-01]

Reported by Usha Thiagarajah

JUDGMENT

Mohd Saari Yusoff JCA:

The appellant appealed against the decision of Justice Ariffin Zakaria who dismissed her application for the following reliefs:

a) A declaration the defendant's decision on 12.11.2001 in unilaterally revoking the plaintiff's results in July 2001 Certificate of Legal Practice Examination (the said examination) is in violation of the established rules of natural justice and fair play;

b) A declaration the decision making process resorted by the defendant in annulling the plaintiff's July 2001 results in the said examination is fatally flawed thereby meriting the Honourable Court's interference and indulgence to review and restore the said results;

c) A declaration the plaintiff was entitled to a legitimate expectation of being heard before the defendant annulled the July 2001 results in the said examination;

d) A declaration the defendant is estopped from annulling the July 2001.

e) A declaration the decision the defendant made on 27.11.2001 annulling the plaintiffs results in the said examination is null and void, of no consequence, inoperative and not on the authority of a valid or legal power;

f) A declaration the communication to the plaintiff by the defendant on 27.11.2001 that she had failed the July, 2001 CLP examination is illegal, arbitrary and contrary to the principles of law and ought to be quashed and set aside;

g) An order the defendant be directed to declare its decision on 27.11.2001 that the plaintiff had failed the July, 2001 CLP examination is unlawful, inoperative and of no consequences;

h) An order the defendant be directed to declare the July, 2001 results in the said examination are lawful and valid;

i) Costs; and

j) Any further or other relief deemed fit and proper by the Honourable Court.

Apart from appellant, the said decision was also binding on 14 other plaintiffs who made similar requests to have their original examination result reinstated.

Background

The appellant sat for the said examination. The respondent is a Qualifying Board established under s. 4 LPA 1976 ("the Act") with function to provide courses of instruction and to conduct examinations. The said examination was conducted by the respondent pursuant to the said function.

On 13 September 2001, respondent announced the said examination result followed by issuing of Certificate of Legal Practice (exh. CKC1) dated 13 September 2001 which showed that the appellant had a clear pass. However, subsequently the respondent nullified the said examination result followed by issuing of another certificate (exh. CKC2) dated 27 November 2001 which showed that the appellant had failed the said examination.

Under normal procedure, the papers for CLP examination are marked in accordance with the scheme of marks (exh. C). Initially, the papers are examined by an examiner to be followed by re-examination by another examiner. Eventually, the marks are entered into a master list report (the master list) prepared by the director. After the abovementioned steps are taken, the director would table the master list for approval by the respondent.

Thus, in the present case, the master list which contained the result of the said examination was tabled and approved by the respondent. On 10 November 2001 or thereabout complaint was received about the alleged leakage of question papers relating to the said examination and this prompted the respondent to investigate. On the outcome of the investigation, the respondent was satisfied that the said examination and October 2001 examination had been compromised. Then on 12 November 2001, the respondent nullified the result of both examinations.

In the case of appellant, based on her answer scripts (exh. F), she actually failed two papers namely the civil procedure and criminal procedure. In the result, she failed the said examination.

Issues for determination may be crystallised as follows:

i) preliminary issue as to whether the reliefs prayed for fall within the scope of s. 26 LPA 1976;

ii) admissibility of two documents ie, the master list and the answer scripts (exh. D & F respectively);

iii) scope of judicial review;

iv) whether the declaration of original examination results *ultra vires* the Act;

v) Whether the doctrine of estoppel applies;

vi) whether the appellant had legitimate expectation to right of hearing;

vii) on conduct of director.

On The First Issue

It is trite that parties are bound by the pleading. In intitulement as pleaded in OS filed by the appellant, she relied on s. 26 LPA 1976. For the respondents, it is submitted none of the reliefs sought by the appellant fall within the scope of s. 26 of the Act. Under the aforesaid section, the court has jurisdiction to grant four types of remedies as specified under s. 21(1), s. 21(4), s. 22 and s. 23 of the Act, which sections do not apply to persons other than articled clerks. In support, the learned counsel for the respondent relied on the case of *Loganathan a/l PL Suppiah v. Lembaga Kelayakan Profession Undang-Undang Malaysia* [1997] 3 CLJ 914. Tan Sri Zaki urged this court to give a purposive approach in construing s. 26 of the Act. In response, En. Karpal Singh counsel for the appellant submitted that under s. 26 of the Act, there was ample power for the court to grant reliefs sought if the court was satisfied that the respondent (board) was not justified in nullifying the examination result. In the court below, the learned trial judge said that in construing s. 26(1), it should be read together with s. 26(7) and he concluded that on the preliminary issue, the application could not appropriately be made under s. 26 of the Act. We agree. The operative words of s. 26(7) of the Act are "any order under this Act". On this issue, our finding is in the negative. On this ground alone, the appellant's case must fail.

On The Second And Third Issues

It is proposed to deal with the two issues together. For the appellant. En. Karpal Singh submits that both documents (exh. D & F) are inadmissible on the ground that the makers were not called. Thus, bereft of the two documents, the respondent's case cannot stand. Short of the two documents, there is nothing to support the respondent's case.

In response, the respondent submits that the court's function is only to review the decision of the respondent pursuant to s. 26 of the Act and not to act as an appellate body and rehear the case. In support, the respondent cited a passage in *Administrative Law Of Malaysia And Singapore* (1980) by MP Jain at p. 377 which states:

> As regards review of non-jurisdictional facts, courts exercise a very limited jurisdiction. The courts do not act as an appellate body from the tribunal in question but act only in a supervisory capacity. The courts have thus laid down the norm that they would not interfere with the findings of fact by a tribunal unless the same are completely unsupported by evidence. This is known as

> the 'no-evidence' rule. A finding having no evidence to support it is regarded as an error of law and is quashed. If, however, there is some evidence to support a finding of fact, courts do not interfere with the same. The courts do not regard it as their function to interfere with findings of fact by a tribunal merely because of insufficiency or inadequacy of evidence. The courts have evolved such a restrictive rule to review facts as they want to give to the tribunals enough leeway to decide cases entrusted to them for disposal. Too much interference with them may take away the advantages and rationale of tribunal adjudication. But, at the same time, these bodies cannot be left completely uncontrolled lest they should act in an arbitrary manner. Therefore, the 'no-evidence' rule has been evolved to impose a limited judicial review on facts decided by them.
>
> If there is some evidence to support a finding of fact, it is not then for the courts to go into the sufficiency of adequacy of evidence. It is not the court's function to review, reassess, reappreciate, reappraise evidence, or draw its own inferences as to facts from the evidence. The court will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence. The court has to take the evidence as it stands and not go into question of reliability of evidence in a petition for *certiorari*.

Further, it is submitted that the court as a judicial authority must look at all the facts and evidence that were before the board. Thus, the respondent was not obligated to adduce first hand evidence but merely to show that it had considered all relevant facts and disregarded irrelevant facts. With that submission, we agree. Further, in our view, on question of whether the two documents (exh. D and F) which the respondent had acted upon were admissible or not is a non-issue. Looking from another perspective, bearing in mind that the present case proceeded on the basis of affidavit evidence, hearsay rule does not apply by virtue of s. 2 of Evidence Act 1950. Moreover, the facts as contained in the impugned documents (exh. D & F) are not being contradicted by other evidence.

On Fourth And Fifth Issues

Facts disclosed in para. 17 of Wahab's affidavit was that based on the written scripts of the appellant, marks given by examiner was 291/2 for civil procedure and 33 marks for criminal procedure. Whereas in the master list prepared by Khalid, marks written therein were 40 marks for each subject which is the minimum passing marks. If the respondent were to uphold the decision based on examination result as pronounced on 13 September 2001, such an act is *ultra vires* the Act being contrary to s. 5(e) of the Act.

Decision based on examination results as pronounced on 13 September 2001 which is void is not a decision. In this regard, it is pertinent to refer to the article by Michael Akehurst in *Public Law* (1982) at p. 619 which states:

> A void decision is, strictly speaking, not a decision at all and therefore does not need to be revoked. If a public authority has taken a decision which is void, it is entitled to ignore that decision and to consider the matter again as if the original decision had never existed. In this context, a decision is regarded as void if it is *ultra vires*.

On doctrine of estoppel, it has no application to the facts of the present case as the original decision, being void, had never existed.

On Sixth Issue

Generally, procedure at the inquiry should not be conducted in the same manner as in a criminal trial in a court of law. What is required is that the procedure must be fair. What is fair will depend on the facts and circumstances of each case, as stated by Tucker LJ in *Russel v. Duke of Norfolk* [1949] All ER 109 at p. 118:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with and so forth.

Facts disclosed in this case is that many students besides the appellant were informed that they had passed and accordingly started their pupilage. Thus the respondent had a duty to act with great promptitude. The respondent held many meetings to ensure that the integrity of the profession was maintained. On the facts, the number of pupils were nearly 300, which made it impracticable to conduct individual hearings with each of the candidates involved.

In any event, the appellant was given a right to appeal which she did appeal and the respondent considered her appeal. Although the respondent did not hear the candidates individually the fact that the respondent went through every paper and convened numerous meetings showed that it gave careful consideration and did not act in a cavalier manner. The respondent also consisted of responsible persons including the attorney general and senior judges. The respondent also heard the views of the Bar Council.

On this issue, the learned judge in the court below had this to say:

> Judging from the content of the Plaintiff's letter I don't think any hearing would have made any difference. The Plaintiff himself stated there was no impropriety on his part, and the Defendant never for a moment alleged that there was any impropriety or blameworthiness on the part of the Plaintiff for this unfortunate episode. On that ground alone it could be argued that there is no necessity in the circumstances of this case for the right of hearing to be given to the Plaintiff or any other candidates before the decision to revoke the July examination results was taken by the Defendant.

Further the learned judge said:

> For the above reasons I agree with the submission of Tan Sri Zaki that in the circumstances of this case it is not practicable for the right of hearing to be given to the Plaintiff or any other candidates and any hearing would not have made any difference. Thus based on the facts of this case, I think the Plaintiff has not in any way been prejudiced by the failure on the part of the Defendant to afford him the right of hearing, hence such a failure could not vitiate the decision to revoke the July examination results.

With the above finding, we agree.

On Seventh Issue

For the appellant, it is submitted that respondent must take responsibility for the wrongful act of the director. In support, En. Karpal Singh cited the case of *Bohjaraj a/l Kasinathan v. Nagarajan a/l Verappan & Anor* [2001] 4 CLJ 433. In that case, it is an action for damages for alleged tort. Unlike that case, here is case for judicial review. In our view, the principle as enunciated in that case has no application to the present case.

Conclusion

By this OS, in effect the appellant is asking the court to pass a candidate who had in fact failed in the said examination. Declaration is a discretionary remedy. Based on the grounds as set out above, we do not think that it is in the interest of the profession or the public for the court to exercise the discretionary power in her favour. The learned judge in the court below was right in dismissing the application and we so affirm. The appeal is dismissed with costs. Deposit is for the account of costs to be taxed.

My learned brothers Abdul Hamid bin Hj. Mohamad and Mohd. Noor bin Hj. Ahmad have read this judgment in draft and have expressed their agreement.